88-1689

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

No.

In The
SUPREME COURT OF THE UNITED STATES

SHELDON HALL CLOTHING, INC.,
SHELDON MEHRMAN t/a MEYER D. MEHRMAN &
SON and SHELDON MEHRMAN,

Petitioners

vs.

TRUSTEES OF THE AMALGAMATED INSURANCE
FUND,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Inc., Sheldon Mehrman
t/a Meyer D. Mehrman &
Son and Sheldon Mehrman

The Questions Presented for Review

1. Whether the United States Court of Appeals for the Third Circuit (the court below) erred in failing to reverse the decision and judgment of the United States District Court for the Eastern District of Pennsylvania and dismiss the action where the appellee failed to comply with 29 U.S.C. Section 1401 (b) (2) in that its action to confirm the arbitration award was filed later than thirty (30) days after the issuance of the arbitrator's award thereby denying the court below of jurisdiction.

Suggested answer - yes

2. Whether the arbitration award in the within matter cannot be enforced against Sheldon Mehrman inasmuch as the

award itself does not make findings against Sheldon Mehrman as an individual nor does it award damages to the Respondent against Sheldon Mehrman.

Suggested answer - yes.

3. Whether the calculations of the Respondent are incorrect in that it assessed interest at ten (10) percent per annum and liquidated damages at ten (10) percent per annum contrary to the terms of the Multi-Employer Pension Plan Amendments Act.

Suggested answer - Yes

Parties to the Proceedings in the United States District Court For the Eastern District of Pennsylvania and the United States Court of Appeals for the Third Circuit

Petitioners-Appellants-Defendants

Sheldon Hall Clothing, Inc. [1]
Sheldon Mehrman trading as Meyer D. Mehrman and Son
Sheldon Mehrman

Respondent-Appellee-Plaintiff

Trustees of the Amalgamated Insurance Fund

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[1]. The Corporate Petitioner, Sheldon Hall Clothing, Inc., has no affiliates, parent companies or subsidiaries.

C. Table of Contents

	Page
Table of Cases and Authorities	V
Statements of Subject Matter	2
Jurisdiction and Appellate Jurisdiction	
Statement of Issues	7
Statement of the Case	4
Standard of Review	13
Argument	13
Conclusion	32
Appendix A-Third Circuit Opinion	App. 1
Appendix B-Denial of Rehearing	App. 13
Appendix C-District Court Judgement	App. 15
Appendix D-District Court Order	App. 16

D. Table of Cases and Authorities

	PAGE
Multi-Employer Pension Plan Amendments Act, 29 U.S.C. Section 1381	7,15,24
Multi-Employer Pension Plan Amendments Act, 29 U.S.C. Section 1381-1399	4,18
Multi-Employer Pension Plan Amendments Act, 29 U.S.C. Section 1399 (c)(D)(6)	31
Multi-Employer Pension Plan Amendments Act, 29 U.S.C. Section 1399	19,25,26
Multi-Employer Pension Plan Amendments Act, 29 U.S.C. Section 1401 (b) (2)	i, 4, 15, 16, 18, 20,21,22, 23,25
Multi-Employer Pension Plan Amendments Act, 29 U.S.C. Section 1401 (a)(1)	18,20,27
Multi-Employer Pension Plan Amendments Act, 29 U.S.C. Section 1401	15,19,24
Multi-Employer Pension Plan Amendments Act, 29 U.S.C. 1451	4,15,21

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vs.

TRUSTEES OF THE AMALGAMATED INSURANCE FUND,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Opinions Below

The Opinion of the United States Court of Appeals for the Third Circuit is

unreported and is reproduced as Appendix A. The Order of the United States Court of Appeals for the Third Circuit denying a petition for rehearing is reproduced as Appendix B. The Judgment of the United States District Court for the Eastern District of Pennsylvania is unreported and is reproduced as Appendix C. The Order of the United States District Court for the Eastern District of Pennsylvania denying a motion for reconsideration is unreported and reproduced as Appendix D.

Statement of Jurisdiction

Jurisdiction of Your Honorable Court with regard to this Petition for Certiorari is based upon Section 1254 (1) of Title 28 of the United States Code, 28

U.S.C. Section 1254, in that the Petitioner is seeking review of a Judgment of the United States Court of Appeals for the Third Circuit.

The United States Court of Appeals for the Third Circuit affirmed the Judgment of the United States District Court for the Eastern District of Pennsylvania on December 8, 1988.

A timely Petition for rehearing was filed with the Court of Appeals for the Third Circuit which was denied by Order of that Court dated January 5, 1989.

Statutes which are the Subject of this Petition

Multi-employer's Pension Plan Amendments Act, 29 U.S.C. Section 1401

(b) (2):

Multi-employer Pension Plan Amendments Act, 29 U.S.C. Section 1451 (f):

Statement of the Case

1. Procedural History.

This is an action by the Respondent, Trustees of the Amalgamated Insurance Fund, against the Petitioners for confirmation and enforcement of an arbitration award for withdrawal liability under the Multi-Employer Pension Plan Amendments Act of 1980, 29 U.S.C.A. Sec 1381-1399 (hereinafter, MPPAA). The case was tried before the Honorable E. Mac Troutman, District Judge of the District Court of the United States District Court for the Eastern District Pennsylvania on

July 2, 1987. After trial thereon the court entered judgment "in favor of the Respondent and against the Appellant, jointly and severally in the amount of $490,643.65 ($238,198.75 plus "double interest" thereon at the rate of twenty (20) percent per annum plus One Hundred and Fifty Dollars ($150.00) for arbitrators fees and legal costs as awarded by the arbitrator. The courts' Memorandum and Order was entered by the Clerk of Courts of the United States District Court on January 14, 1988. Thereafter, the Appellant filed a Motion for Reconsideration of that Order pursuant to the Rules of Civil Procedure of the United States District Court for the Eastern District Pennsylvania at No. 20

(g). On March 4, 1988 the court below entered a memorandum and order denying the motion for reconsideration.

The Petitioners filed an appeal to the United States Court of Appeals for the Third Circuit at No. 88-1184 asking review of the action of the United States District Court in the context of the issues presented herein.

The Court of Appeals affirmed the Judgment of the District Court on December 8, 1988. A timely Petition for Rehearing was filed. The Court of Appeals dismissed this Petition on January 5, 1989. This Petition for Writ of Certiorari is now before your Honorable Court.

2. Statement of the Facts

The Respondent filed this action in order to confirm and enforce an arbitration award purportedly entered on October 27, 1983, by one, Millard Cass. The arbitration was held for the purpose of obtaining an award for withdrawal liability against two (2) separate entities - one Sheldon Hall Clothing, Inc., a Pennsylvania corporation and the second being Sheldon Mehrman, trading as Meyer D. Mehrman. The arbitration was held to assess the withdrawal liability pursuant to the Multi-Employer Pension Plan Amendments Act, 29 U.S.C. Section 1381 et seq.

The undisputed facts of this case which were admitted at trial by the parties is

that the Respondent by and through its Deputy Plan Administrator gave notice of withdrawal liability and a demand for payment upon "Sheldon Mehrman, President; Sheldon Hall Clothing, Inc.,/Meyer D. Mehrman" by letter dated December 28, 1981. (Joint Exhibit No.1). This Notice of Withdrawal Liability was contested by the Petitioners named in that notice in a timely manner and review of the assessment was requested pursuant to 29 U.S.C. Section 1391 (b) (2) (A) (i) by a letter dated February 19, 1982. (Joint Exhibit NO. 2). The Deputy Plan Administrator responded to this request for review and refused to make an adjustment to the assessment of liability or rule in favor of the Defendants on the

applicability of liability. (Joint Exhibit No. 3). Thereafter, the Deputy Plan Administrator for the Respondent made demand for payment of the withdrawal liability as previously assessed and as previously contested by the Petitioners. (Joint Exhibit No. 4). Subsequently, the administrator gave notice of arbitration and requested that the arbitrators stray the proceedings. A formal "Motion to Stay the Arbitration" was filed with the arbitrator contesting the withdrawal liability once again. (See Petitioners' Exhibit list, D-7). Thereafter an arbitration was held on September 20, 1983, and an award was rendered against Sheldon Hall Clothing, Inc., and "Meyer D. Mehrman." (Joint Exhibit No. 6).

The Respondent filed the within action to confirm the arbitration award on December 18, 1984 - some fourteen (14) months after the purported award. This matter came before the Court below for trial on July 2, 1987, at which time the case was heard without a jury. Two (2) witnesses testified at the time of trial. The first was Sheldon Mehrman, who was called as on cross-examination (Appendix pg 76). He testified that he was the sole shareholder of Sheldon Hall clothing, Inc. and was the sole proprietor of Meyer D. Mehrman & Son. On cross-examination Mr. Mehrman testified that those two (2) entities were totally separate in the business that they conducted (Appendix pp 80-90). The contracts they had with third

parties were different and did not relate to each other. Furthermore, the two (2) entities did not contract to do work for each other. Sheldon Hall Clothes, Inc., was a corporation dedicated to performing the clothing function of "sewing." Meyer D. Mehrman & Son was a manufacturer that sent its garments out to be sewed to another contractor not owned or related to Mr. Mehrman or Sheldon Hall Clothes, Inc.

The second witness to testify was Jeffery Walbert who was the Acting Assistant Vice-President of the Amalgamated Life Insurance Company which is the Administrator of the Amalgamated Insurance Fund. He simply testified that the original arbitration award entered in

the amount of Two Hundred Forty-Eight Thousand Two Hundred Eighteen and 10.100 ($248,218.10) Dollars was now valued at Four Hundred Ninety Thousand Four Hundred Ninety-three and 65/100 ($490,493.65) Dollars. In making these calculations to determine that the principal was Two Hundred Thirty-eight Thousand One Hundred Ninety-eight and 75/100 ($238,198.75) Dollars and then applied a ten (10) percent per annum liquidated damage charge from the same date. This was an effective annual interest yield of twenty (20) percent to the Respondent. Mr. Walbert further testified on cross-examination that he had no knowledge of the underlying transactions which gave rise to the arbitration award. He was not familiar

with the calculations necessary to determine the actuarial assumptions as required by the Act. His sole function was to testify as to the fact that this sum was the withdrawal liability as assessed by Richard Burker the Plan Administrator and that the Respondent was now looking for a judgment in the amount of Four Hundred Ninety Thousand Four Hundred Ninety-three and 65/100 ($490,493.65) Dollars.

Argument

1. THE COURT BELOW ERRONEOUSLY FOUND THAT THE WITHIN ACTION COULD PROCEED AS AN "INDEPENDENT ACTION" UNDER 29 U.S.C. SEC. 1451.

The undisputed facts of this case indicate that Millard Cass, the appointed arbitrator held an arbitration on September 20, 1983, at 770 Broadway, New York, New York finding at item No. 1 "That Sheldon Hall Clothing, Inc., and Meyer D. Mehrman constitute a common control group. . ." and thereby entered an award against the "Respondents" (Sheldon Hall Clothing, Inc./Meyer D. Mehrman). No where does the award mention Sheldon J. Mehrman. Subsequent to the purported award the Respondents filed an action with this Court at the within cause number on December 18, 1984 some fourteen (14) months after the purported award. The within action has been brought pursuant to the Multi-Employer Pension Plan

Amendments Act (MPPAA), 29 U.S.C. sec. 1381, et seq. to establish and enforce withdrawal liability. The enforcement of that section of the act can be found at 29 U.S.C. Sec. 1401. The applicable portion of this section is (b) (2) which provides as follows:

> "Upon completion of the arbitration proceedings in factor of one of the parties, any party thereto may bring an action, no later than thirty (30) days after the issuance of an arbitrator's award in an appropriate United States District COurt in accordance with Sec. 4301 [29 U.S.C.S. sec 1451] to enforce, vacate or modify the arbitrator's awards." (Emphasis added)

The Petitioners are aware of no cases specifically interpreting Sec 1401 (b) (2). Nevertheless, the Section appears to be clear on its face and mandatory by virtue of its language. Such a provision

is to provide certainty to the litigants as to what action they are facing. In the present case the action to confirm the arbitration award was filed approximately fourteen (14) months after the original award. Because of the passage of such a great period of time this action is and should be barred from enforcement and the award rendered unenforceable.

The evidence presented at trial in this matter indicates the Petitioners at all times contested the assessment of the Respondent from beginning to end. Joint Admission No. 2 as well as Joint Exhibit No. 2, indicate a timely request by Sheldon Hall Clothing, Inc./Meyer D. Mehrman for a review. Furthermore, when

the arbitration was finally noticed Sheldon Hall Clothing, Inc./Meyer D. Mehrman filed a motion with the arbitrator pursuant to his notice asking that the arbitration be stayed. This Exhibit is listed as D-7 on the Petitioner's Exhibit list and was introduced as a defense exhibit. Furthermore, the arbitrator's award which is before the Court as Joint Exhibit No. 6 clearly indicates that the Respondents in that arbitration contested the withdrawal liability assessment. As a result of these actions by the Respondents to the arbitration the Respondent took action under 29 U.S.C. sec 1401 (a) this provision provides in part:

> (a) ARBITRATION PROCEEDINGS; MATTERS SUBJECT TO ARBITRATION, PROCEDURES APPLICABLE, ETC. (1) Any dispute

> between an employer and the planned sponsor of a Multi Employer Plan concerning a determination made under Sections 4201 through 4219 [29 U.S.C. Sections 1381 - 1399] shall be resolved through arbitration. . ." (emphasis added).

The Petitioners respectfully submit that the Courts position at page 8 of its Memorandum of January 14, 1988 which provides the "We believe that to interpret Sec. 1401 (b) (2) in the manner suggested by the Petitioners, i.e., so as to require the Respondent to have filed its action within thirty (30) days of the arbitrator's award, would neither give effect to all of ERISA'S enforcement provisions nor effect the statute's remedial purpose..." is an erroneous view of the purposes of this section of "MPPAA". Section 1399, 29 U.S.C. sec 1399

provides for the method of collection of withdrawal liability. This Section is placed in a strategic area of the Statue prior to sec. 1401, resolution of disputes, 29 U.S.C. Sec. 1401. Section 1399 provides the statutory process for collecting withdrawal liability which has not been disputed, or if having been disputed, such dispute being resolved in favor of the plan. In order to provide that the provisions of "MPPAA" not be confiscatory in violation of the constitutional rights of the appellants, Congress enacted the procedures under Section 1401. As set forth above, Section 1401 (a) when read in conjunction with sec. 1309 provides an intervening method. Even if you read the Statute as

allowing the plan to collect withdrawal payments during the pendency of a dispute, such rights of the Plan in no way allow the Plan to ignore the explicit mandatory provision of sec 1401 (b). One should not be confused by the title of Sub-Section b of sec 1401 which refers to "alternative collection proceedings;..." that only applies to sec 1401 (b) (1). As the Court properly notes in its Memorandum the plan chose to proceed to arbitration. As a result, they are bound by sec 1401 and specifically sec 1401 (b) (2). The Statute provides as follows:

> "Upon completion of the arbitration proceedings in favor of one of the parties, any party thereto may bring an action, no later than thirty days after the issuance of a arbitrators award, in an appropriate United States District Court in accordance with Section 4301 (29 U.S.C. Section 1451) to enforce, vacate, or modify

the arbitrators award" (Emphasis added).

The undisputed evidence in this case indicates that the plan did not proceed in accordance with the Statute. Nothing in ERISA and MPPAA allows a deviation from the time periods in Section 1401 (b) (2). The failure of the plan to meet its time limits, divest this Court of Jurisdiction. Neither the Action in the Southern District of New York or the Action filed with this Honorable Court has been filed within the thirty day time period.

At page 9 of the Courts Memorandum, it is indicated that the Defendants interpretation of Section 1401 (b) (2) does not make provision for the situation in which an employer makes the installment payments of withdrawal liability. It is

respectfully submitted that this is an erroneous interpretation of the complex mosaic of the Statute. As indicated in the Memorandum the court found that "in interpreting a statute, here ERISA, we are required to read the act so as to, wherever possible, give effect to all of its component parts." The court can except the appellants interpretation of Section 1401 (b) (2) and at the same time give effect to all of the provisions of the statute. The statute simply provides that during the dispute process installment payments should be made. The logical conclusion is that after the dispute is resolved, if the employer is entitled to repayment, the Plan is obligated to make those repayments. The

Congressional intent at this point was to provide for funding of withdrawal liability during the pendency of litigation so that the long litigation process would not deprive these plans of necessary funding. To accept the courts interpretation of Section 1401 (b) (2) would render the section totally ineffectual in providing that even though there is a method to resolve disputes it has no real effect. It is respectfully submitted and suggested to the court that the interpretation set forth above is the interpretation intended by Congress. This intent is reflected in Section 1401 (d), 29 U.S.C. Section 1401. (d). There it is provided:

> Payments shall be made by an employer in accordance with the determinations made under this part (29 U.S.C.

> Section 1381 et seq.) until the arbitrator issues a final decision with respect to the determination submitted for arbitration with any necessary adjustments in subsequent payments for over payments or under payments arising out of a decision of the arbitrators with respect to the determination..." (Emphasis added)

All Congress has done is avoid the lack of funding of plans during the pendency of litigation. No where has Congress indicated that there is no dispute procedure which may effect the question of overpayments. In the present case, no payments have been made but that fact alone does not stop the court from ruling in the Petitioners favor based upon a failure to comply with Section 1401 (b)(2).

2. THE COURT ERRONEOUSLY FOUND AGAINST SHELDON MEHRMAN INDIVIDUALLY INASMUCH AS

HE WAS NOT A NAMED PARTY TO THE ARBITRATION PROCEEDINGS AND THE NOTICE OF COLLECTION REQUIRED UNDER 29 U.S.C. Sec 1399 (b).

Before there can be enforcement of any arbitration award it is the Respondent's burden to prove that the arbitration award is directed to and lodged against a named appellant. In the within matter the caption of the arbitration award is as follows:

"In the matter of arbitration of disputes between the Trustees of the Amalgamated Insurance Fund, Petitioners and Sheldon Hall Clothing, Inc./Meyer D. Mehrman, Respondents."

No where in the Findings of Fact nor the awards does it pertain to Sheldon Mehrman as an individual. The first place that Sheldon Mehrman's name appears is in

the caption of this within action. This action mentions the name 'Sheldon Mehrman' as an alleged employer within the terms of MPPAA while no prior documentation leading to the arbitration as well as the award itself mentions him by name. The Respondent cannot now begin a new action outside of the arbitration against Sheldon Mehrman by a Complaint filed on December 18, 1984. Such an action circumvents the enforcement provisions of MPPAA 29 U.S.C. Section 1399 provides for requisite notice and rights of a respondent employer to contest the notice. That has not been given to Sheldon Mehrman in this case. As a result the Respondent has not complied with 29 U.S.C. Section 1401 (a)(1) thereby initiating an arbitration

within sixty (60) days as required against Sheldon Mehrman. Most importantly, however, is that a notice was not sent to Sheldon Mehrman individually assessing withdrawal liability as required by subsection (b). For all of these reasons the action should be dismissed as to Sheldon Mehrman individually.

It is respectfully submitted that the courts reasoning at page 10 of its Memorandum concerning the fact that Sheldon Mehrman received notices as a basis for imposing liability upon him. The undisputed testimony and evidence in this case is to the effect that Meyer D. Mehrman & Son was a sole proprietorship which is to say that it was an individual. Service of process under Federal Rule of

Civil Procedure No. 4 allows Service of Process against a corporation to be made upon "an officer managing or general agent, or to any other agent authorized by appointment or by law to receive Service of Process and, if the agent is one authorized by statute to receive service and the statutes that requires, by also mailing a copy to the defendant." Even though Rule 4 permits service upon the certain designated individuals Rule 4 does not impose liability upon the individual served. Liability is upon the corporation. Therefore, just because service was given to Sheldon Mehrman does not indicate that he was on notice that he was to be personally liable. When the reading the documentation supplied in the

form of notice of withdrawal and notice of the pendency of the arbitration, the documents themselves indicated that he was not a named party. The first time he realized that liability was being sought against him personally was at the time of service of the within action. To make him a party to the enforcement action of an arbitration that occurred several years ago constitutes a lack of due process. His presence as a party in a proceeding may very well have been different then his presence as an individual against whom no liability was being sought.

3. THE COURT BELOW ERRONEOUSLY ASSESSED "DOUBLE INTEREST" ON THE JUDGMENT ENTERED HEREIN.

At the time of trial the Respondent's witness testified that he calculated damages applying at ten (10) percent per annum interest rate and a ten (10) percent per annum liquidated damage rate. No where have the Petitioners been able to determine the authority for the calculation of this interest and liquidated damages. First of all, it is curious that the Respondent has applied liquidated damages on an annual basis. While the Act does not provide for liquidated damages the theory for liquidated damages is that actual damages are not readily calculable and therefore the parties agree upon a theory of liquidated damages. Nevertheless, counsel for the Petitioners is unaware of any

liquidated damages provision that provides for reassessment for those damages on an annual basis. Therefore, it would appear that a calculation of ten (10) percent per annum would be an improper method of assessing liquidated damages should such provision be applicable.

29 U.S.C. Section 1399 (c)(D)(6) appears to be the provisions that provides for the assessment of interest. That provision provides as follows:

> "except as provided in Paragraph one (1) (A) (ii), interest under this subsection shall be charged at rates based on prevailing market rates for comparable obligations, in accordance with regulations prescribed by the corporation."

No where in the evidence presented by the Respondent or in the arbitration award which is to be confirmed has it been shown what the appropriate interest rate is to be. As a result the Respondent fails to meet its burden of proof with regard to any calculation of liquidated damages or interest.

Conclusion

For all of the above reasons the Petitioners respectfully request your Honorable Court to reverse the action of the United States District Court for the Eastern Division of Pennsylvania and the United States Court of Appeals thereby vacate its orders of March 4, 1988 denying reconsideration and its previous order of

January 12, 1988 entering judgment against the Petitioners filed by the District Court and the Orders of December 8, 1988 and January 5, 1989 of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 88-1184

TRUSTEES OF THE AMALGAMATED INSURANCE FUND

v.

SHELDON HALL CLOTHING, INC. and SHELDON MEHRMAN, t/a MEYER D. MEHRMAN & SON
and SHELDON MEHRMAN,

Appellants

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil Action No. 84-6184)

Argued September 16, 1988

Before: BECKER, HUTCHINSON and SCIRICA,
Circuit Judges

(Filed December 8, 1988)

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OPINION OF THE COURT

SCIRICA, *Circuit Judge*.

This appeal arises under the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), Pub.L. No. 96-364, 94 Stat. 1208 (codified in scattered sections of 5, 26 & 29 U.S.C.). The principal question raised is whether, under 29 U.S.C. § 1401(b)(2), a pension plan qualified under MPPAA that wins an arbitration award against a withdrawing employer must file an action in federal district court to confirm the award within 30 days or forever be barred from execution. We hold it does not and we will affirm the judgment of the district court.

Due to an apparent contradiction between the provisions of this complex statute, we believe a brief analysis of the MPPAA is necessary.

I.

The MPPAA was enacted as an amendment to the Employee Retirement Income Security Act of 1974, Pub.L. No. 93-406, 88 Stat. 1020 ("ERISA") (codified as amended at 29 U.S.C. § § 1001-1461 (1982)), and was intended, in part, to discourage employers from withdrawing from multiemployer pension plans and, thus, leaving those plans with unfunded liabilities. H.R. Rep. No. 869, 96th Cong., 2d Sess. 67, *reprinted in* 1980 U.S. Code Cong. & Admin. News 2918, 2935. It

does so by imposing upon the withdrawing employer a mandatory liability, defined in the statute as the employer's adjusted "allocable amount of unfunded vested benefits." 29 U.S.C. § 1381(b)(1).

Upon an employer's withdrawal from a pension plan, the plan's trustees determine the amount of the withdrawal liability. 29 U.S.C. § 1381. The trustees then notify the employer of both the amount of liability and a schedule for payments, and make a formal demand for payment. 29 U.S.C. § 1399(b)(1). After the employer receives notice of the amount of its withdrawal liability, it may, within ninety days, request review by the plan's trustees. 29 U.S.C. § 1399(b)(2)(A). If a dispute persists after review, then either party may initiate arbitration proceedings. 29 U.S.C. § 1401(a)(1).

Section 1401(b)(2) provides for review of the arbitrator's award by the district court:

> Upon completion of the arbitration proceedings in favor of one of the parties, any party thereto may bring an action, no later than 30 days after the issuance of an arbitrator's award, in an appropriate United States district court in accordance with section 1451 of this title to enforce, vacate, or modify the arbitrator's award.

An aggrieved party, however, need not go to arbitration. Section 1451 creates an independent cause of action in federal district court for any party to a multiemployer plan "who is adversely affected by any act or omission" under the MPPAA. Section 1451(f) provides:

> An action under this section may not be brought after the later of--(1) 6 years after the date on which the cause of action arose, or (2) 3 years after the earliest date when the plaintiff acquired or should

> have acquired actual knowledge of the existence of such cause; except that in the case of fraud or concealment, such action may be brought not later than 6 years after the date of discovery of the existence of such cause of action.

These two sections, on their face, appear to contradict each other. Section 1401(b)(2) provides in one clause for a 30-day limitation period and yet, in the next clause, limits itself to the terms of § 1451, which provides for a three- or six-year limitation period.

II.

Appellant Sheldon Hall Clothing, Inc. ("SHC"), was a Pennsylvania corporation, with Sheldon Mehrman as its president and sole shareholder. Appellant Meyer D. Mehrman & Son ("MMS"), was a sole proprietorship founded by Sheldon Mehrman's father, but solely owned and operated by Sheldon Mehrman at all times relevant to this case. In the Fall of 1981, both entities went out of business.

By letter dated December 28, 1981, appellees Trustees of the Amalgamated Insurance Fund ("the Trustees") notified the appellants of withdrawal liability in the amount of $238,198.75. The letter was addressed in the following manner:

> Sheldon Mehrman, President
> Sheldon Hall Clothing, Inc./Meyer D. Mehrman
> 418 North Franklin Street
> Allentown, PA 18102

App. at 24.

Following a review and reaffirmation of the withdrawal liability, the Trustees demanded arbitration against SHC and "Meyer D. Mehrman." Sheldon Mehrman appeared at the arbitration hearing with counsel, David Schattenstein, an attorney who

had been retained by him. On October 27, 1983, the arbitrator awarded the Trustees the full $238,198.75 it had claimed, plus legal fees. App. at 38. Oddly, the arbitrator's Findings and Award indicated that appearances were made for SHC and MMS by "David C. Schattenstein and Meyer D. Mehrman." App. at 36.

On November 28, 1983, 30 days after the arbitrator made his award,[1] the Trustees brought suit in United States District Court for the Southern District of New York to enforce the award pursuant to 29 U.S.C § 1401(b)(2). For reasons which do not appear on the record before us, the New York district court dismissed the Trustees' action without prejudice on December 7, 1984.

More than a year later, on December 18, 1985, the Trustees instituted a second action to enforce the arbitrator's award in the United States District Court for the Eastern District of Pennsylvania. The Pennsylvania district court ruled in favor of the Trustees on Januaray 12, 1988, awarding $490,643.65 ($238,198.75 plus "double interest," at the rate of 20% per annum, plus legal costs). This appeal followed.

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1. The Trustees filed their petition by leaving it in the night depository for the Clerk of the Court of the Southern District of New York after 5:00 P.M. on the night of November 28, 1983. General Rule 1(a) of the Southern District of New York provides that papers so deposited are considered filed as of the following business day. Consequently, appellants originally contended that the Trustee's papers were not deemed filed until November 29--31 days after the arbitrator made his award. Since the district court issued its ruling, however, the United States Court of Appeals for the Second Circuit has ruled that, despite General Rule 1(a), papers are deemed filed with the Clerk of the Court of the Southern District of New York at the actual time they are placed in the night depository. *Greenwood v. State of N.Y. Office of Mental Health*, 842 F.2d 636, 639 (2d Cir. 1988). Given our holding, however, this fact is not controlling.

III.

Appellants principal contention is that the Trustees filed their action out of time--specifically, after the 30-day period prescribed by 29 U.S.C. § 1401(b)(2) had elapsed. The Trustees respond that the applicable time limitation is either three or six years under § 1451(f) and therefore the action to enforce was timely filed.

Which time limitation applies is a matter of legislative intent. To determine intent, we must examine both the statutory language and the policy behind it. *Robert T. Winzinger, Inc. v. Management Recruiters*, 841 F.2d 497, 498 (3d Cir. 1988). Unfortunately, the recorded legislative history is sparse and provides no guidance on this point. *See* H.R. Rep. No. 869, 96th Cong. 2d Sess., *reprinted in* 1980 U.S. Code Cong. & Admin. News 2918. As we have already observed, the statutory language appears contradictory. Nonetheless, it is a canon of statutory construction that a statute should be interpreted, wherever possible, to give effect to all of its component parts. *Mountain States Tel. & Tel. Co. v. Santa Ana*, 472 U.S. 237, 249 (1985); *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979). We must therefore look not merely to a particular clause, but to the statute as a whole, while simultaneously attempting to give effect to the MPPAA's purpose of protecting the assets of multi-employer pension plans. *Stafford v. Briggs*, 444 U.S. 527, 535 (1980) (quoting *Brown v. Duchesne*, 19 How. 183, 194 (1857)).

The only logical construction of the MPPAA is for § 1401(b)(2)'s 30-day limitation to apply only to actions to modify or vacate the arbitrator's award, while the three- or six-year limitation of § 1451(f) applies to actions to confirm an arbitrator's award. Despite the fact that "enforce" is juxtaposed with "vacate" and

"modify" in the text of § 1402(b)(2), we do not believe that Congress intended that pension plans be required to reduce favorable arbitration awards to judgment within 30 days upon pain of forever being barred from collecting the award.

To accept appellant's construction of the two statutes at issue here would run counter to common sense. It would permit, for example, an employer to comply with an arbitrator's assessment for a period exceeding 30 days after the issuance of the arbitrator's award and then stop making withdrawal liability payments. The fund would then be deprived of a remedy because it failed to seek "enforcement" of the arbitrator's award within the 30-day time period prescribed by § 1401(b)(2). It thus seems clear, when attempting to give effect to all of the statute's component parts, that Congress did not intend that the arbitration provision of § 1401 be used to enforce an arbitrator's award.

We also note that pension plans might forego arbitration entirely if it meant exchanging the three- or six-year limitation period under § 1451(f) for a 30-day limitation period under § 1402(b)(2). This would undermine Congress' clearly expressed preference for self-regulation of the MPPAA through arbitration. *Republic Industries v. Central Pa. Teamsters*, 693 F.2d 290, 294-95 (3d Cir. 1982).

Given our conclusion that actions to enforce an arbitrator's award under the MPPAA is governed by the three- to six-year limitation period of § 1451(f), we find that the Trustees' action was timely filed.

IV.

Appellants also contend that the district court erred by assessing interest on their withdrawal liability at a rate of 10% per annum, plus an additional 10% per

annum in damages, for an effective interest rate of 20%.[2]

29 U.S.C. § 1451(b) provides that in an action under § 1451 to compel payment of withdrawal liability, any failure by the employer to make a payment on time shall be treated in the same manner as a delinquent contribution within the meaning of 29 U.S.C. § 1145. As we have already held in *Penn Elastic Co. v. United Retail & Wholesale Emp.*, 792 F.2d 45, 47 (3d Cir. 1986), the relevant costs provision for actions under § 1145 is 29 U.S.C. § 1132(g)(2), which provides in part:

> (2) In any action under this subchapter by a fiduciary for or on behalf of a plan to enforce section 1145 of this title in which a judgment in favor of the plan is awarded, the court shall award the plan--
>
> (A) the unpaid contributions,
>
> (B) interest on the unpaid contributions,
>
> (C) an amount equal to the greater of--
>
> (i) interest on the unpaid contributions, or
>
> (ii) liquidated damages provided for under the plan in an amount not in excess of 20 percent (or such higher percentage as may be permitted under Federal or State law) of the amount determined by the court under subparagraph (A). . . .

Section 1132(g)(2)(C) goes on to provide that the court shall apply the interest rate prescribed by the terms of the pension plan itself which, in this case, is ten percent. Under subparagraph (C), the court should then award an additional amount equal to the lesser of the interest on the unpaid amounts or liquidated damages provided for under the plan. Here, adding an

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2. Appellants do not challenge the calculation of the principal amount of the withdrawal liability.

amount equal to the original ten percent interest--leading to an effective interest rate of twenty percent per annum--was correct. Moreover, we note that award of these amounts plus reasonable attorney's fees is mandatory for the district court, not discretionary. *Penn Elastic Co.*, 792 F.2d at 47; *United Retail & Wholesale Employees Teamsters Union Local No. 115 Pensions Plan v. Yahn & McDonnell*, 787 F.2d 128, 134 (3d Cir. 1986), *aff'd by an equally divided Court, Pension Ben. Guaranty Corp. v. Yahn & McDonnell*, 107 S. Ct. 2171 (1987) (per curiam).

V.

Finally, Sheldon Mehrman contends that the award of withdrawal liability cannot be enforced against him individually because he neither received notice as an individual nor did the arbitration award contain findings against him individually. We find this argument lacks merit.

Sheldon Mehrman's own testimony at the arbitration hearing established that he was the owner of MMS, a sole proprietorship. The District Court properly concluded that MMS and SHC constituted a commonly controlled group and Sheldon Mehrman has not appealed this finding.[3] Notice to one member of a commonly controlled group constitutes notice to every member of that group. *IUE AFL-CIO Pension Fund v.*

---

3. Section 1301(b)(1) provides in part that "all employees of trades or businesses (whether or not incorporated) which are under common control shall be treated as employed by a single employer and all such trades and businesses as a single employer." *See also Yahn & McDonnell*, 787 F.2d at 131 n.2.

To determine whether two or more employers constitute a commonly controlled group within a withdrawal liability dispute, the MPPAA incorporates the Internal Revenue Code's definition a "controlled group of corporations." *IUE AFL-CIO Pension Fund v. Barker & Williamson*, 788 F.2d 118, 123 (3d Cir. 1986) (referring to 26 U.S.C. § 1563(a)(1) (1982)).

Barker & Williamson, 788 F.2d 118, 127 (3d Cir. 1986). Even with the confusion between the names "Meyer D. Mehrman" and "Sheldon Mehrman," the December 28, 1981, letter constituted proper legal notice to at least SHC. Therefore, MMS had legal notice as well.[4]

Similarly, under ERISA, companies under common control are jointly and severally liable for one another's debts. 29 U.S.C. § 1301(b)(1); *Teamsters Pension Trust Fund v. H.F. Johnson*, 830 F.2d 1009, 1013 (9th Cir. 1987). Congress explicitly provided for individual liability of employers who operate as sole proprietors in 29 U.S.C. § 1405(c):

> To the extent that the withdrawal liability of an employer is attributable to his obligation to contribute to or under a plan as an individual (whether as a sole proprietor or as a member of a partnership), property which may be exempt from the estate under section 522 of Title 11 or under similar provisions of law, shall not be subject to enforcement of such liability.

Section 1405(c) protects only those assets which would be exempt under the Bankruptcy Code from being used to satisfy withdrawal liability of sole proprietors. The clear implication, therefore, is that other personal assets of an individual which are not exempt under the Bankruptcy Code may be used to

---

4. We believe that a letter personally addressed to "Sheldon Mehrman, President" of "Meyer D. Mehrman" constituted sufficient legal notice in any event. Moreover, Sheldon Mehrman not only retained an attorney to represent "Meyer D. Mehrman" at the arbitration hearing, he appeared at the hearing personally. At no time did either Sheldon Mehrman or his attorney ever attempt to correct the misunderstanding. In sum, Sheldon Mehrman has been aware of, and fully participated in, this litigation from the outset. Therefore, we find the argument disingenuous that Sheldon Mehrman had no notice of the controversy.

satisfy a sole proprietor's withdrawal liability. The legislative history of § 1451(c) confirms this view:

> The Committees recognize that some employers that are obligated to contribute to multiemployer plans are individuals, i.e. sole proprietors or partners. The Committees believe that if such an employer withdraws from a multiemployer plan, some of the employer's personal assets, such as his residence, should be shielded from employer liability. A special rule provides that where the withdrawn employer is an individual, the employer's personal assets that would be exempt under bankruptcy law will be protected from employer liability.

126 Cong.Rec. S20195 (daily ed. July 29, 1980). We note that individual liability in this context is consistent with the general rule that a sole proprietor is personally liable for all debts of the business; the proprietor's personal assets and the proprietorship's business assets are legally a single financial estate. *See, e.g., Securities and Exchange Commission v. W.L. Moody & Co.*, 374 F.Supp. 465, 472 (S.D.Tex. 1974), *aff'd*, 519 F.2d 1087 (5th Cir. 1975); *Securities and Exchange Commission v. Wick*, 360 F.Supp 312, 315 (N.D.Ill. 1973).

Consequently, even if there were some technical error of process with regard to Sheldon Mehrman personally, as the sole proprietor of MMS, he is jointly and severally liable for any withdrawal liability owed by either MMS or SHC.

VI.

For the reasons discussed, we will affirm the judgment of the district court.

Costs taxed against the appellant.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

(A.O. U.S. Courts. G.M.C. Printing, Phila., Pa. 215-568-4264)

App. 13

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 88-1184

TRUSTEES OF THE AMALGAMATED INSURANCE FUND

v.

SHELDON HALL CLOTHING, INC. and
SHELDON MEHRMAN, t/a MEYER D. MEHRMAN & SON
and SHELDON MEHRMAN,

Appellants

(D.C. Civ. No. 84-6184)

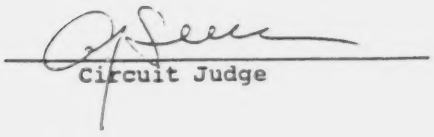
SUR PETITION FOR REHEARING

Present: GIBBONS, Chief Judge, SEITZ,
HIGGINBOTHAM, SLOVITER, BECKER,
STAPLETON, MANSMANN, GREENBERG, HUTCHINSON,
SCIRICA, COWEN and NYGAARD, Circuit Judges

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the

petition for rehearing by the panel and the Court in banc, is denied.

BY THE COURT,



Circuit Judge

Dated: JAN 5 1989

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

TRUSTEES OF THE AMALGAMATED INSURANCE FUND, Plaintiffs	:	
v.	:	CIVIL ACTION NO. 84-6184
SHELDON HALL CLOTHING, INC.; SHELDON MEHRMAN, t/a MEYER D. MEHRMAN & SON; and SHELDON MEHRMAN, Defendants	:	

ORDER

TROUTMAN, S.J.

AND NOW, this 12th day of January, 1988, in accordance with the attached memorandum, IT IS ORDERED that:

(1)JUDGMENT IS ENTERED in favor of the plaintiff and against the defendants, jointly and severally, in the amount of $490,643.65($238,198.75 plus "double interest" thereon at the rate of 20% per annum from March 17, 1987, to July 2, 1987 plus $150.00 for arbitrator's fees and legal costs as awarded by the arbitrator); and

(2)the plaintiff is awarded the reasonable attorney's fees and costs it incurred in prosecuting this action. The plaintiff shall within twenty(20) days of the date that this Order is filed with the Clerk of this Court file an appropriate affidavit setting forth such fees and costs.

1-14-88

E. Mac Troutman S.J.

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

TRUSTEES OF THE AMALGAMATED INSURANCE FUND, Plaintiffs	:	
v.	:	CIVIL ACTION NO. 84-6184
SHELDON HALL CLOTHING, INC.; SHELDON MEHRMAN, t/a MEYER D. MEHRMAN & SON; and SHELDON MEHRMAN, Defendants	:	

ORDER

TROUTMAN, S.J.

AND NOW, this 4th day of March, 1988, upon consideration of the defendants' Motion For Reconsideration, Doc. #18, and the plaintiff's response thereto, Doc. #19, IT IS ORDERED that the defendants' Motion For Reconsideration is DENIED.

S.J.

ENTERED: 3/8/88

CLERK OF COURT

SUPREME COURT, U.S.
FILED
APR. 28 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1683

IN THE

SUPREME COURT OF THE UNITED STATES

SHELDON HALL CLOTHING, INC.,
SHELDON MEHRMAN t/a MEYER D. MEHRMAN &
SON and SHELDON MEHRMAN,
Petitioners

v.

TRUSTEES OF THE AMALGAMATED INSURANCE FUND,
Respondent

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CASES AND AUTHORITIES

CASES Page

IUE-AFL-CIO Pension Fund vs. Barker & Williamson, 788 F.2d 118 (3rd Cir. 1986) 3

Lad's Trucking vs. Board of Trustees, 777 F.2d 118 (3rd Cir. 1986) 4

Penn Electric Company v. United Retail and Wholesale Employees Union Local 115 Joint Pension Fund, 729 F.2d 45 (3rd Cir. 1986) 4

Teamsters Pension Fund Trust vs. H.F. Johnson, 530 F.2d 1009 (9th Cir. 1987) 4

Trustees of the Amalgamated Insurance Fund vs. Geltman Industries, Inc., 784 F.2d 1926 (9th Cir. 1986) 4

STATUTES

Multi-Employer Pension Plan Amendments Act, 29 U.S.C. Section 1401(b) 1, 2

Multi-Employer Pension Plan Amendments Act, 29 U.S.C. Section 1401(b)(2) 2

Multi-Employer Pension Plan Amendments Act, 29 U.S.C. Section 1401(d) 2

Multi-Employer Pension Plan Amendments Act, 29 U.S.C. Section 1451(f) 3

Employee Retirement Income Security Act, 29 U.S.C. Section 1132(g) 1, 4, 5

Employee Retirement Income Security Act, 29 U.S.C. Section 1145 ..... 2, 4

a. Summary of Argument

The Employee Retirement Income Security Act clearly was designed to permit collection by a multi-employer fund on delinquent contributions whether or not the arbitration award is confirmed. The language of the act contains no mandatory requirement for confirming the arbitration award and, furthermore, since withdrawal liability is paid in installments, it would seem illogical to require the confirmation of an award utilizing an already busy Federal Court system even though the withdrawing employer may not become delinquent until well after 30 days following the award. Obviously, the Act contemplated utilization of the 3-year/6-year statute of limitations even if there is an arbitration award.

The present interpretation of ERISA by the Federal Courts clearly mandates that all employers in a control group are jointly and severally liable and that service of process upon one employer is service upon all employers in the control group.

29 U.S.C. 1132(G) states that a fund is entitled to interest on unpaid contributions plus liquidated damages in an amount equal to the greater of interest on the unpaid contributions or liquidated damages provided for under the plan in an amount not in excess of 20%. Clearly, liquidated damages in an amount equal to the interest on the unpaid contributions is permissible under ERISA and less then 20% as authorized by the Act.

b. Argument

I. THE COURT BELOW CORRECTLY FOUND THAT THE WITHIN ACTION COULD PROCEED AS AN "INDEPENDENT ACTION: UNDER 29 U.S.C. 1451.

It is submitted that the design of ERISA is to permit collection actions within the limitation period established under Section 1451(f) irrespective of whether the arbitration award is timely confirmed under 29 U.S.C.

Section 1401(b). It should be noted that 29 U.S.C. Section 1401(D) states in part:

> ". . . If the employer fails to make timely payment in accordance with such final decision, the employer shall be treated as being delinquent in the making of a contribution required under the plan (within the meaning of Section 515). [29 U.S.C. Section 1145]."

Independent of enforcing an arbitration award, the respondent in this matter has a right to collect delinquent contributions prior and subsequent to the entry of an arbitration award. It should be noted that 29 U.S.C. Section 1401(b) states:

> "Any party *may* bring an action, no later than thirty days after the issuance of an arbitration award. . . . to enforce, modify or vacate the arbitration's award." [emphasis supplied].

The Section specifically uses the word "*may*" indicating that confirmation of an award is not mandatory.

In fact, the Court below held that the petitioner's proposed construction of 1401(b)(2) "would run counter to common sense." (App. 7). The Court correctly stated that:

> "If thus seems clear, when attempting to give effect to all of the statute's component parts, that Congress did not intend that the arbitration provision of Section 1401 be used to enforce an arbitrator's award." (App. 7).

If the intent is to limit a Plan to confirmation of an award within thirty days, an employer would simply be able to frustrate collection by making installments as they become due and thereafter, at a point in time beyond the thirty day period simply refuse to make any further payments. Then, the Fund would be barred from bringing an action in Federal Court to collect the additional unpaid withdrawal liability. It is obvious that

Congress would not intend such an interpretation of ERISA which would lead to a frustration of a plan from collecting a delinquent amount awarded by the arbitrator. A logical interpretation as reasoned by the Court below is to treat assessed withdrawal liability similarly to delinquent contributions and, therefore, the time limitation of 1451(f) being either three or six years should apply.

Clearly, the respondent in this matter should not be barred from collecting withdrawal liability which by interpretation of the act is construed as a delinquent contribution simply for failure to confirm an award in thirty days, which said confirmation by the language of ERISA is, in fact, not mandatory in any event.

II. THE COURT CORRECTLY DETERMINED THAT SHELDON MEHRMAN IS INDIVIDUALLY LIABLE IN AN ACTION FOR WITHDRAWAL LIABILITY UNDER ERISA.

The Third Circuit Court of Appeals in the matter of *IUE-AFL-CIO Pension Fund vs. Barker & Williamson*, 788 F.2d 118 (3rd Cir. 1986), held that notice of withdrawal liability to one member of a "common control group" is notice to all the members of the group. Testimony in this matter, as well as joint exhibit 1 indicate that notices were mailed to Sheldon Mehrman, Inc., Sheldon Mehrman, President of Sheldon Mehrman, Inc. and Meyer Mehrman. The Court below stated that Notice to Sheldon Mehrman, Inc. was proper and, therefore, would constitute legal notice to Meyer Mehrman & Sons (App. 10). Such notices are sufficient to satisfy the requirements of ERISA for notification of withdrawal liability to all members of that common control group. Under the circumstances, Sheldon Mehrman, individually, having notice of this action cannot now shield himself with the argument that he was not a party, since it is clear that any member of a control group

are jointly or severally liable and should be treated as a single employer and, therefore, bound by the decision of arbitrator. See *Teamsters Pension Fund Trust vs. H.F. Johnson*, 830 F.2d 1009, 1013 (9th Cir. 1987).

III. THE COURT CORRECTLY PERMITTED PLAINTIFF TO ASSESS 10% PER ANNUM INTEREST WHICH WAS THE RATE PROVIDED FOR BY THE PLAN, AS WELL AS AN ADDITIONAL 10% PER ANNUM AS LIQUIDATED DAMAGES ON THE PRINCIPAL AMOUNT OF THE JUDGMENT.

Several cases have determined that when withdrawal liability installment payments are not paid when due, the plan is entitled to treat the failure to pay the withdrawal liability as a delinquent contribution. See *Lad's Trucking vs. Board of Trustee*, 777 F.2d 1371, 1374 (9th Cir. 1985) and *Trustees of the Amalgamated Insurance Fund vs. Geltman Industries, Inc.*, 784 F. 1926 (9th Cir. 1986). Section 1451(b) of ERISA directs that any action to compel payment of withdrawal liability shall be treated as an action to collect delinquent contributions in accordance with 29 U.S.C. 1145. See *Penn Electric Company v. United Retail & Wholesale Employees Union Local 115 Joint Pension Fund*, 792 F.2d 45 (3d Cir. 1986).

29 U.S.C. 1132(g) requires that any judgment include interest on the unpaid contributions *and* liquidated damages in "an amount equal to the greater of (i) interest on the unpaid contributions, or (ii) liquidated damages provided for under the plan in an amount not in excess of 20 percent . . . ."

Since the plan provided for interest at the rate of 10%, the act specifically authorizes additional damages of 10% per annum being the interest which is provided for under the plan as testified to by Jeffrey Warbet, the

plan's representative at the trial of this matter. Therefore, the award of the Court is clearly in accord with the statutory authority of 29 U.S.C. 1132(g).

c. Conclusion

For all of the above reasons the respondent respectfully requests this Honorable Court to dismiss the Petition for Certiorari.

Respectfully submitted,

SILBERMAN, MARKOVITZ,
MEO & RASLAVICH

BY: _____

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Certification of Bar Membership

I, Michael S. Silberman, certify that I have been admitted to membership in the Bar of the United States Supreme Court and I am presently a member in good standing of that Bar.

_____

Michael S. Silberman